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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 203

DENNIS COUNCLE McGAUTHA,

Petitioner,

v.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

The determinative question in this case is whether the concept of due process of law, which is embodied in the Fourteenth Amendment, imports the need for standards by which a jury is to be guided in performing its function of deciding whether a person convicted of murder in the first degree should be put to death. Neither the State of Cali-

fornia nor the Solicitor General comes to direct grips with that question. Neither of them denies, each of them seeks to circumvent, the proposition that the Constitution forbids the deprivation of one's life "except in accordance with the valid laws of the land . . ." [see, *Giaccio v. Pennsylvania*, 382 U.S. 399, 403]; or with its corollary, that the phrase "due process of law" in the Fourteenth Amendment connotes ascertainable standards fixed by law, pursuant to which the issue of deprivation must be determined. [See, *Petr. Br.*, 20-25.[1] In that connection each of them misconstrues the argument we have made as being only that there must be such standards as will adequately notify the defendant of the conduct he must avoid to remain law-abiding. Neither, therefore, takes note of or attempts to answer the argument we actually made–*i.e.*, that it is not merely the public that must be apprised by standards that do not leave it uncertain what is prohibited, but, as well, judges and jurors, who cannot be "left free to decide without any legally fixed standards" what is prohibited conduct and what is the sanction for it. [*Petr. Br.*, 23-25.]

Neither California nor the United States contends that "sentencing procedure is immune from scrutiny under the Due Process Clause," for unquestionably it is not. [*Williams v. New York*, 337 U.S. 241, 252 (fn. 18); *Witherspoon v. Illinois*, 391 U.S. 510, 522 (fn. 20); *Townsend v. Burke*, 334 U.S. 736, 740.] Due process of law imports standards for judges and jurors, as well as for the public. They are required of a statute under which one may be deprived of

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[1] In addition to the abbreviations specified in Rule 40, 1, (e), the following are used in this brief:

"Cal. Br."	=	Respondent's Brief.
"U.S. Br."	=	Brief for the United States as Amicus Curiae.
"A.C. Br."	=	Brief *Amici Curiae* v. the N.A.A.C.P. Legal Defense Fund, Inc., et al.
"Petr. Br."	=	Brief for Petitioner.

his life, liberty or property. No explanation has been vouchsafed the Court why the most awesome and uncorrectable part of the sentencing procedure should be an exception to this principle, a principle which is really the law and the prophets of the Due Process Clause.

We propose, therefore, to reply to the general drift of the opposition arguments that have been advanced.

ARGUMENT

I

SINCE CALIFORNIA'S PENALTY IMPOSITION PROCEDURE IS STANDARDLESS, THE STATE'S ARGUMENT THAT A PENALTY TRIAL IN THAT STATE IS PROCEDURALLY SAFEGUARDED BY RULES OF EVIDENCE, THE RIGHT TO APPELLATE REVIEW, AND THE LIKE, DOES NOT MEET AT ALL THE PROPOSITION THAT SUBSTANTIVE STANDARDS BY WHICH TO DETERMINE WHETHER A DEFENDANT IS TO BE DEPRIVED OF HIS LIFE ARE CONSTITUTIONALLY REQUIRED.

1. The Argument Ignores That In The Instant Case The Jury Were Charged That The Law Provided No Standards

The principal difficulty with California's argument about standards is that it ignores what was actually done in this case in respect of giving the jury any standards to guide their determination whether to deprive petitioner McGautha, of his life. What was actually done was to give the jury just this charge:

> "It is the law of this state that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury . . . Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and absolute discretion. That verdict must express the individual opinion of each juror.

> "Now, beyond describing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience and absolute discretion of the jury . . ." [A. 222-223.]

In the fact of that charge, it is idle to argue, as California persistently does, about "standards which are provided under California law . . ." [See, *e.g.*, *Cal. Br.*, 1, 13, 14, 15, 41, 56, 81. But, see, Point I, 4, *First, infra.*] If there are any such standards, they were sedulously kept from the jury that ordered that McGautha be put to death. The fact is—and California does not attempt to deny it, except, perhaps, by dubious innuendo—the law of California, as the jury were told, "provides no standard."[2] [See, *Petr. Br.*, 10-12.]

To be sure McGautha's jury was told, as California notes, that they "should consider all of the evidence . . ." and that they "may also consider all of the evidence . . . of the facts in aggravation or mitigation of the penalty which have been received here in court . . ." [A. 222.] But that seeming invitation to consider either aggravation or mitigation was immediately denigrated, for they were next told that "it is not essential to your decision that you find mitigating circumstances . . . or evidence in aggravation . . ."; and that, "[n]otwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience and absolute discretion . . ." [A. 222-223.]

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[2]The charge from which we have just quoted to that effect is not only the usual one given in California; it is the only one that need be given about determination of penalty. [See, *Petr. Br.*, 6 (fn. 4), 10, 12 (fn. 9).]

The relevant state statute [*Cal. Penal Code*, secs. 190, 190.1], in terms, does not establish any standards or require that any be given the jury. The decisional gloss upon the statute makes it very plain that there are no standards and that none need be given the jury.[3] [Cases cited, *Petr. Br.*, 10.] The determinative question, therefore, is whether the Due Process Clause requires that there be standards; for, if it does, the constitutional error in the disposition made of McGautha's life is starkly apparent. We have argued that the very concept of that "law," pursuant to which, and only to which, a person may be deprived of his life imports the need for ascertainable standards established in advance of the proceeding in which the issue of deprivation is to be determined. [*Petr. Br.*, 20-29.] California does not even attempt to meet that argument, but slides off it by uninformative references to "standards which were given."

The point we have tried to make in this regard was better expressed nearly 75 years ago by Mr. Justice Matthews speaking for this Court in *Yick Wo v. Hopkins*, 118 U.S. 356, 369, where was involved the constitutionality of an ordinance that conferred the discretionary, but standardless,

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[3]Whether that gloss makes the statute as such, or only its application to a specific case, unconstitutional is really immaterial. That would be a difference of consequence if review here had been sought by direct appeal. [28 U.S.C.A., § 1257. See, *Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256, 259.] Even then the difference would be of no great moment, for the Court would treat the appeal papers as a petition for certiorari. [28 U.S.C.A., § 2103.] Certiorari jurisdiction covers the entire field of federal questions that can arise in a law suit in the state courts. [R. Stern and E. Gressman, *Supreme Court Practice* (4th ed.), p. 89, § 3.5.] This case is here on certiorari, and so the question of the constitutionality of California's death-penalty imposition procedure is properly here in either of the aspects in which it may have arisen—on the face of the statute or as the result of the application of the statute to petitioner's case. [28 U.S.C.A., § 1257(3): *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 629.]

power to grant or deny a license to engage in an otherwise lawful business:

> "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power . . . the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law . . . so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.'. . ."

What that means is that the power to deprive a person of his "life, liberty or property" must not be exercised, by the governmental agent that holds the power, arbitrarily or in pursuance of personal or *ad hoc* notions, but in accordance with the law; and that, in turn, means in accordance with standards fixed by the law. It is not enough merely to give the holder of the power the precatory charge not to exercise it arbitrarily; the law must fix limits beyond which action becomes arbitrary to that arbitrariness may be avoided. [See, *Petr. Br.*, 20-22.]

In this connection, California insists that the issue that is given to the jury in a death-penalty case is whether the defendant is "fit to live." [*Cal. Br.*, 13, 14, 31, 61.] That phrase, in the context from which California lifted it [see *Witherspoon v. Illinois*, 391 U.S. 510, 522 (fn. 20)] no doubt is an apt general characterization of the kind of job a capital-sentencing jury has to do; but, it is not a standard.[4] And, even if it is, it was not given to McGautha's jury.

[4] One man's idea of fitness may be another's idea of unfitness, just, as it is generally recognized, one man's orthodoxy may be another's heresy. [*Cf., American Communications Association v. Douds*, 339 U.S. 382, 438, Jackson, J., conc., and diss.] As a criterion of decision whether to sentence a man to death, the phrase "fit to live," even if

"What more can be done," California asks, "than giving the jury instructions which tell them to base their verdict on specified permissible criteria and not to exercise their discretion arbitrarily? . . ." [*Cal. Br.*, 65.] We need not argue that any more needs to be done, for not even that much was done in this case. What we do argue, and what California pointedly ignores, is that its statute does not require that the jury be told, nor were they told in the case at bar, "to base their verdict on *specified* permissible [or any] criteria . . ." (Italics ours.) Specific criteria can be, indeed, they have been, fashioned.[5] [*Petr. Br.*, 27-29.]

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it had been given McGautha's jury, is much too amorphous to have told them any more than they were told; and what they were told was nothing more informative than that they were to decide whether he should be put to death, according to their own "judgment, conscience and absolute discretion . . .," for which decision the law provided them with "no standard." [A. 223.]

[5]California's heavy emphasis on the asserted conclusion of the British Royal Commission that "fixed standards" are unfeasible [*Cal. Br.*, 16, 77, 98-100], is quite misplaced. The quotations from the Report found in California's brief [pp. 99-100] do not come from any of the Committee's discussion relating to jury sentencing, but from its consideration of the question whether there should be degrees of murder. The suggestion under discussion was that one degree "would be so defined as to comprise the gravest murders and would be punishable by death; the second degree would comprise all other cases of murder and would be punishable only by imprisonment . . ." [*Report*, pp. 167-168.]

More, specifically, the context from which California took its quotations was the Commission's discussion of whether "premeditation" or "intent to kill" was an objective characteristic adequate to make the proposed differentiation. [*Report*, pp. 174-176.] The Commission concluded it would not be, largely because many of the worst murders are not premeditated in the sense of "planned and cold-blooded" [*Report*, pp. 174-175], while "intent to kill" would require the death penalty in cases where there were mitigating circumstances making a lesser penalty appropriate. [*Report*, p. 176.]

Nor need we argue that the standards must be so precise as invariably to lead to an infallibly correct decision. [*Cf., Cal. Br.*, 63-64.] All that is required, and all that can be reasonably expected, is that the standards be such as to guide the jury in a way that is most likely to lead them to a correct result. What such standards should be is a legislative question. Because it is just that, it leaves much room to the States to make their own determinations of policy and of the form of standards that will effectuate that policy.

The Commission, it is clear [see, *e.g., Report*, 176-177] was not concerning itself, in that part of its report upon which California draws, with any effort—such as the one successfully made by the American Law Institute and the National Commission on Reform of Federal Criminal Laws—to classify or categorize generally the kinds of facts and circumstances usually found in connection with or offered in aggravation or mitigation of homicides. The Royal Commission was, rather, concerning itself with the suggestion that "the definition of murder in the first degree" be based "on a list of categories of murder selected as being those for which the capital sentence is considered to be the most appropriate . . ." [*Report*, p. 176.] The Commission evidently concluded that it was unfeasible so to categorize murders. California, in company with a considerable number of other States [see, *e.g., Report*, pp. 167-168], has encountered no such difficulty. [See, *Cal. Penal Code*, secs. 187, 189, quoted in full, *Petr. Br.*, 3 (fn. 1).]

It is quite a different matter from the one the English body thought unfeasible, to formulate a number of general categories into one or the other of which there may be fitted the various facts and circumstances usually attendant upon a homicide or which are commonly advanced as tending to aggravate or mitigate the crime. This does not involve anticipation of all of the varying circumstances that may arise. The general *kinds* of circumstances are known from the past experience of our courts and penologists. The pertinent general categories are deducible from that experience.

2. The Question Whether California's Standardless Procedure Is Preferable To One Based On Ascertainable Standards Is Legislative, Not Judicial. In Any Event, It Is No Negation Of A Constitutional Requirement Of Standards.

California argues at length that "flexible guidelines . . . are constitutionally preferable . . ." to fixed standards. [*Cal. Br.*, 56 *et seq.*] Since that argument is advanced in the context of California's standardless procedure, it is apparent that what is meant by "flexible guidelines" is that State's practice of leaving the matter to the "judgment, conscience, and absolute discretion" of the jury, with "the law itself" providing "no standard for the guidance of the jury . . ." [A. 222-223.] What the State is arguing, therefore, is that the standardless procedure is better than one based on standards.

Of course, that is not the question here. The question is whether the Due Process Clause requires definition and application of some standards—standards that are adequate to guide the jury to the result that the law seeks to reach on the facts before the jury. What those standards should be is a legislative, not a judicial question. California's argument about preferability, therefore, is beside the point.

3. It Is No Substitute For The Absence Of Standards That In Other Respects California's Procedure May Be Regular.

California engages in a painstaking review of its death penalty imposition procedure [*Cal. Br.*, 20 *et seq.*] which does no more than duplicate a similar but shorter review made by us. [*Petr. Br.*, 10-17] The conclusion that California draws from its review is that the procedure has not been constructed to make the jury's exercise of discretion anything less than an even-handed one; all evidence relevant to the issue of penalty is admitted; the right to review of error is preserved; and the jury is told not to be arbitrary; in short, that the process of imposing the death penalty is

surrounded by various procedural safeguards. Even if all of this is so, it too, is beside the point.[6] Nothing in the procedure provides any standards fixed by the law, or requires that the jury be given any standards to guide their determination of the proper penalty. It is not an error for which a verdict of death may be set aside or reduced, so far as California's procedure is concerned, that there are no such standards; for, as is said in California's brief, and as is undoubtedly the law of California [cases cited, *Petr. Br.*, 16], "in the absence of substantial error requiring reversal of the [penalty] verdict . . . [the Supreme Court] will not substitute its judgment as to choice of penalty for that of the trier of fact.' . . ."[7] [*Cal. Br.*, 46.]

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[6]Evidence, argument and jury instructions that are relevant to the comparative desirability of one rather than the other of the penalties are excluded. [See, *e.g.*, *People v. Nye*, 71 Cal. 2d 356, 368-369, 78 Cal. Rptr. 467, 473-474, 455 P.2d 395, 401-402; and the cases cited, *Petr. Br.*, 13.]

[7]It is misleading, in this connection, to point, as California does [*Cal. Br.*, 49, and Appendix, 3-4, 6-9], to the number of cases in which, on appeal or post-conviction attack upon a judgment of conviction of a capital offense, the judgment was set aside. These were not cases in which that result was reached because the penalty verdict did not conform to law or was too severe, or was otherwise unwarranted by law. So far as the reversals related to the penalty rather than the guilt phase of the trial, these are cases in which, virtually without exception, the ground for the Court's action was either (1) that the trial court had admitted evidence, given an instruction, or permitted argument, about the possibility that one sentenced to life would be paroled or otherwise freed in a relatively short time [see, *e.g.*, *People v. Morse*, 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33; *People v. Varnum*, 61 Cal. 2d 425, 428-429, 38 Cal. Rptr. 881, 392 P.2d 961]; or, (2) the trial court had failed to select the jury in accordance with *Witherspoon* requirements; because, as the State Supreme Court somewhat grudgingly puts it, "[u]nder the compulsion of *Witherspoon* . . ." a new trial must be had to a jury, selected as this Court has held in *Witherspoon* it should be selected. [See, *e.g.*, *In re Anderson*, 69 Cal. 2d 613, 617, 619, 634, 73 Cal. Rptr. 21, 24-25, 35, 447 P.2d 117, 120-121, 131.]

It is of little, if any, consequence, to a defendant sentenced to death at a standardless trial, that the evidence admitted on the issue of penalty was relevant, if the jury were not told how to measure or weigh the effect given by law to that evidence.[8] It is similarly of little consequence

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Guilt convictions were reversed on a variety of grounds, having no relation of any kind to the nature or choice of penalty. These grounds, for example, included among others, permitting evidence of statements obtained from the defendant without informing him of his rights to silence and the presence of counsel, contrary to *People v. Dorado*, 62 Cal.2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 [*People v. Spencer*, 66 Cal.2d 158, 57 Cal. Rptr. 163, 424 P.2d 715]; coerced confession [*People v. Sanchez*, 70 Cal.2d 562, 576-577, 75 Cal. Rptr. 642, 651, 451 P.2d 74, 83]; admission of extra-judicial declaration of a co-defendant [*People v. Gonzales*, 66 Cal.2d 482, 58 Cal. Rptr. 361, 426 P.2d 929]; inadequate representation by counsel [*People v. McDowell*, 69 Cal. 2d 737, 73 Cal. Rptr. 1, 447 P.2d 97]; denial of change of venue. [*People v. Tidwell*, 3 Cal.3d 62, 89 Cal. Rptr. 44, 473 P.2d 762.]

[8]In this connection, it is worthwhile noting, as this Court has noted, that imposition of the death penalty "is different in kind from a finding that the defendant committed a specified criminal offense . . ." [*Witherspoon v. Illinois, supra*, 391 U.S. at 522 (fn. 20).] No doubt, when a jury performs its usual function of determining which of the varying versions of fact testified to is more probably or certainly the true one, they need no precise or specific guidance as to how to weigh the evidence. Even then, however, some guidelines are customarily given, either in the way of the judge's comments on the facts, or a more formal instruction. For examples in the instant case, see, the instructions on circumstantial evidence; on judging the credibility of witnesses; on the credit to be given a witness false in one part of his testimony; on how to weigh the testimony of one witness as against that of a number of witnesses; on the credit to be given expert witnesses. [A. 22-23.] But much more than determinations of credibility, weight and probable truth, are involved in the determination whether the defendant should be put to death or imprisoned for life. [See, *Witherspoon v. Illinois, supra*, 391 U.S. at 522 (fn. 20).] Surely, in the accomplishment of a function so grave and awesome as that, there is need for some guidance as to what it is that the law considers

that the jury were told not to be arbitrary when, in the same breath, they were told the matter of sentence rested in their absolute discretion, for the exercise of which the law provided them with no guidelines or standards. Nor is the possibility of executive clemency, as a matter of grace, any constitutional substitute for the right to be condemned only by due process of law. It is the law, not grace, that must save one's rights. [*Cf.*, the cases last cited, *Petr. Br.*, 22. Also, to the same effect, see: *In re Gault*, 387 U.S. 1, 73, Harlan, J. conc. and diss.; *Grand Trunk R. Co. v. Michigan R. Com.*, 231 U.S. 457, 470-471; *In re Harris*, 69 Cal. 2d 486, 490, 72 Cal. Rptr. 340, 343, 446 P.2d 148, 151.]

The short of the matter is that, no matter how procedurally correct or fair a penalty trial is, or how effectively procedural error may be reviewed, the determination of the penalty is left to the absolute and uncontrolled determination of the jury. That is the constitutional deficiency in California's procedure, for it leaves imposition of the ultimate penalty unguided and uncontrolled by law.

4. The Record Does Not Reasonably Permit Of The Inference That The Death-Penalty Verdict Against McGautha Was Based On Constitutionally Permissible Grounds. Even If It Did, Unconstitutionality Would Not Be Avoided, For It Is The Statute, Not Judicial Discretion, That Must Save The Defendant's Rights And, Constitutionality Must Be Judged By The Natural Operation And Effect Of The Statute.

California argues that it is inferrable from the record here that McGautha's jury acted on constitutionally permissible grounds in sentencing him to death while sparing his equally guilty co-defendant from that fate. [*Cal. Br.*, 81-98.] The conclusion reached by California from that premise is that McGautha is precluded from "attacking the constitu-

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to be significant determinants and as to what are the objectives that the law seeks to reach by the penalty to be imposed.

tionality of the California procedure on grounds that have no application to himself or his situation." [*Cal. Br.*, 81.] Assuming, for the moment, that California's premise is a reasonable deduction from the record rather than a guess inspired by zealous advocacy, the conclusion derived from it is unsound in law.

First. The ground upon which McGautha attacks the California procedure is that it does not provide any standards by which the jury may determine to deprive him of his life; and, more, that the jury in his case acted pursuant to an express instruction to act in their own absolute discretion, for the exercise of which the law provided no standard. That is a ground directly applicable to him and his situation. There can be no question that the applicable state statute prescribes no standards or that the jury were instructed exactly as we have said they were instructed. California makes a show of arguing that there are standards; but despite frequent repetitions of that assertion, this Court is never referred to any statute or any part of the charge in this case (beyond the direction not to act arbitrarily), in which the nature or import of those standards is stated.

The most that California can do is to point to the general instruction to consider all the evidence, that the jury "may" consider the circumstances surrounding the crime, the defendant's background and history, and the facts in aggravation or mitigation. [*Cal. Br.*, 96.] They were not told, however, what effect for or against imposition of the death penalty any of those circumstances had. Under standards legislatively enacted, some, even many of the general categories into which these circumstances fit, might not be an aggravating circumstance, without proof of which the extreme penalty could not be imposed. [See, for example, *Model Penal Code* (Am. Law Inst., May 14, 1962), sec. 210.6.] As it was, however, there were no limits of any kind upon the extent to and manner in which each individual juror could act upon his own subjective notions of what was or was not arbitrary in the premises, selecting

anyone or more of the circumstances as the, to him, decisive one. They were instructed to that effect, as we have already noted. No amount of rationalization, we submit, can make anything less out of this definitive charge to the jury:

> ". . . Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are *entirely* free to act according to *your own* judgment, conscience, and *absolute* discretion . . . [¶] . . . the law itself provides *no* standards for the guidance of the jury in the selection of the penalty, but, rather, commits the *whole* matter of determining which of the two penalties shall be fixed to the judgment, conscience and *absolute* discretion of the jury . . ." [A. 221-223. Italics ours.]

The fact is that McGautha's penalty trial was standardless, as the jury were clearly and emphatically told. That is his constitutional challenge of the procedure. It is a challenge directly applicable to him and the procedure by which *he* was tried.

Second: If, by chance, the jury did act on constitutionally permissible grounds, that was a fortuitious event, not the consequence of anything required by the law of California. Yet, it is the "law itself [that] must save the parties' rights . . . not the discretion of the courts as such . . ." [*Louisville & N.R.R. Co. v. Central Stockyards,* 212 U.S. 132, 143-144. See, also: *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424-425; *In re Gault, supra,* 387 U.S. at 73; *Grand Trunk R. Co. v. Michigan R. Com., supra,* 231 U.S. at 470-471; *In re Harris, supra,* 69 Cal.2d at 490, 72 Cal. Rptr. at 343, 446 P.2d at 151.]

The law itself puts no limits on the jury. Human propensities being what they are, it is perfectly possible, indeed not unlikely, that under the California procedure juries will take constitutionally impermissible considerations into account and base their verdict upon them. The constitutionality of a statute must be judged by its natural operation

and effect. [*Near v. Minnesota*, 283 U.S. 697, 708-709; *Yick Wo v. Hopkins, supra*, 118 U.S. at 373; *Bailey v. Alabama*, 219 U.S. 219, 235-236; *Davis v. Schnell*, S.D. Ala., 81 F. Supp. 872, 880, *affirmed* 336 U.S. 933. And, *cf. Anderson v. Martin*, 375 U.S. 399, 402, in which it was held constitutionally impermissible, having regard to known attitudes of many people in Louisiana, to require that the race of a candidate for public office be stated on the ballot.

Third: On a record showing that a jury was instructed in accordance with a set of standards, such as that found in the Model Penal Code, sec. 210.6, or in the *Study Draft of a New Federal Criminal Code*, proposed by the National Commission on Reform of Federal Criminal Laws (see *U.S. Br.*, App. G], and showing evidence sufficient to support a finding of one or the other categories of facts specified as necessary to imposition of the death penalty, the inference would naturally follow, on review, that the jury found the needed facts and acted accordingly. A vice of California's procedure is that that kind of informed review of a death-penalty judgment cannot be made; there is no way of knowing, or rationally inferring. on what basis the jury acted.[9] No doubt that is why the State Supreme Court has consistently been unwilling to set aside the jury's determination of penalty save for error of law. [See, *Petr. Br.*, 16.] There would be no need for such unwillingness if, for instance, as a condition to imposing the death penalty, there had to be evidence of a specific category or kind of fact, and that evidence was lacking. With such standards, the death penalty would be imposed by the law; and, as with all questions of law, an erroneous application of the law to the facts in evidence would call for appropriate appellate relief.

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[9]While the right to an appeal is not necessarily a part of due process, once the State accords the right "it must be kept free of unreasoned distinctions that can only impede open and equal access to the courts . . ." [*Williams v. Oklahoma City*, 395 U.S. 458, 459.]

Perhaps, under such a set of standards, the penalty verdict in McGautha's case might have been no different.[10] The point is that then the conformity of the verdict to the Constitution and law could have been informedly reviewed and error corrected. That could not be done in the instant case, under the present state of California's law. We do not know and cannot intelligently infer the particular facts and circumstances among the many open to them upon which the jury acted; and under the present state law the jury were not limited to, or required to act upon the basis of, any of them.

Obviously, it is no clue to the basis of their action that the jurors disclaimed any racial prejudice, and swore to act on the evidence and the law [see, *Cal. Br.*, 82-86], since they were not given any "law" in respect of penalty other than to be told there was none. Nor is ther any such clue in the opening statement of counsel for McGautha's co-defendant.[11] However, much of a "model of restraint" the prosecuting attorney's argument may have been [*Cal. Br.*, 93], it could not take the place of adequate standards provided by law, given the jury by the court as the law of the case. [See, note 10, *supra.*] Absent that procedure, the argument neither forecloses the possibility that the jurors acted on their own subjective ideas, nor gives any reliable indication of the bases upon which they did act.

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[10] If standards are required by the Constitution, the failure to provide or apply them was an error of constitutional magnitude and, therefore, not subject, even in California [see, *Cal. Br.*, 39] to the harmless error rule. In such a case it is immaterial that but for the error the same result probably would have been reached. [*Chapman v. California*, 386 U.S. 18, 21-24.]

[11] In the instructions at the guilt phase of the trial which, the jury were told, they were to follow in the penalty phase [A. 221], they were instructed that they "must not consider as evidence any statement of counsel made during the trial . . ."; and that it was the judge's duty to instruct them in the law, and their duty "as jurors to follow the law as I [the judge] shall state it to you . . ." [A. 22.]

It cannot be assumed, from the fact that the jury inquired about the possibility of parole [A. 224], that the verdict was based on the jury's "concern that petitioner be precluded from killing a third time." [*Cal. Br.*, 95.] When that inquiry was made, the jury were promptly given the "Morse instruction," which told them that "the matter of parole is not to be considered by you in determining the punishment . . ." [A. 224-225. And, see, *Petr. Br.*, 9.] And, finally in this regard, it is no reliable indication of the basis upon which they did act that there were any number of varying facts and circumstances [*Cal. Br.*, 88 *et seq.*], anyone or more of which, under the court's charge, could have been the foundation of their action. On the other hand, it is entirely conceivable that given an appropriate charge under a set of standards like those, for example, of the *Model Penal Code*, sec. 210.6, or the federal *Study Draft*, one or another of those facts and circumstances would have been accepted as making it desirable not to inflict the death penalty.[12]

No doubt, under a constitutional formulation of standards many a jury will return, and lawfully so, a death-penalty verdict. It is not inconceivable that McGautha's jury might have done so. But all that is no negation of our point—for our point in this regard is not that the extreme penalty is *per se* unconstitutional, but that when imposed it must be imposed by a procedure that preserves the defendant's right not to be deprived of his life save by due process of law.

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[12]California seemingly argues that the verdict was motivated by the finding that McGautha was the "trigger man." [*Cal. Br.*, 88.] The evidence on that question was in sharp conflict. [*Petr. Br.*, 7 (fn. 5).] An instruction that even though the evidence sufficed to sustain that finding, if it did not foreclose all doubt, such doubt would be a mitigating circumstance, [*cf. Model Penal Code*, sec. 210.6 (1)(f)], could very well have produced a sentence of imprisonment for life.

II

THE ARGUMENT OF THE UNITED STATES, LIKE CALIFORNIA'S, DOES NOT ANSWER BUT AVOIDS THE QUESTION WHETHER DUE PROCESS OF LAW REQUIRES THAT THE DEATH-PENALTY SENTENCING PROCEDURE MUST BE GUIDED BY ASCERTAINABLE STANDARDS FIXED BY LAW.

A great deal of our reply to California's argument is applicable, as well, to the argument of the United States. The United States, like California, fails to deal with the proposition that "due process of law" means, as this Court has said, that the government cannot take one's life, liberty or property "except in accordance with the valid laws of the land . . ." [*Giaccio v. Pennsylvania*, 382 U.S. 399, 403]; which, in turn, means ascertainable standards, by which not merely to notify the public of what is forbidden, but also to guide judges and jurors in decreeing such a deprivation. [*Petr. Br.*, 20-27.] If that is a correct statement of constitutional law, it is not made incorrect or inapplicable at bar by the collateral considerations of usage, asserted preferability or importance of the jury system in our judicial process, to which the United States adverts in lengthy detail.

Also, like California, the United States argues, in effect, that a system of "flexible standards," evidently meaning no standards, is preferable to one based on so-called rigid standards. That is a legislative question, going to the kind and content that each state, within broad constitutional limits, is free to decide for itself. It is not a judicial question. Nor is it any explication of what due process of law means in respect of standards.

What follows is a reply to the general tenor of the brief for the United States.

1. The Constitutional Requirement Of Standards Is Not Negated By The Age Of The Practice Of Standardless Sentencing.

To a predominant extent the argument for the United States is a repetition of the theme that, thus it has always been, so, therefore, must it always be. [See, *e.g., U.S. Br.*, 29 *et seq.*] Of course, the age of a given course of procedure is a circumstance to be taken into consideration, but it begs the question to rest decision on that circumstance. [See, *Leland v. Oregon*, 343 U.S. 790, 798.] The question is whether the Due Process Clause requires standards. If it does, the right to have them is not lost by prescription.[13] [*Cf., Walz v. Tax Commission*, 397 U.S. 664, 678.] Having regard to the traditional reluctance of courts of last resort to decide constitutional questions not raised or, if raised, not necessary to be decided. [*Cf., Maxwell v. Bishop*, 398 U.S. 262], it is not surprising that there should be no discussion of our immediate question in earlier cases dealing with our phases of jury sentencing. Plenary consideration of this question (for which purpose, this Court has said, certiorari was granted in the instant cases [see, *Maxwell v. Bishop, supra*, 398 U.S. at 267 (fn. 4)]) cannot be forestalled by such understandable silence in the past.

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[13] "No degree of antiquity can give sanction to a usage bad in itself." [*Money v. Leach*, 3 Burr. 1742, 1767, 19 How. St. Tr. 1027, Yates & Ashton, JJ.]

"It is revolting to have no better reason for a rule of law than that it so was laid down in the time of Henry IV . . ." [O. W. Holmes, Jr., Collected Legal Papers (Harcourt, Brace & Howe, 1920), p. 187.]

Mr. Justice Brandeis was no foe of *stare decisis*, for it was he who said, "It is usually more important that a rule of law be settled, than that it be settled right . . ." [*Di Santo v. Pennsylvania*, 273 U.S. 34, 42, Brandeis, J., diss.]. Yet, he pointed out, speaking for the Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-78, that while an erroneous construction of a statute, long adhered to, might not be overturned, the case was different when the unconstitutionality of the course previously pursued has been made clear; in that event, the Court is compelled, he said, to overturn the course previously pursued.

In this regard, *Williams v. New York, supra,* 337 U.S. 241, it is said by the United States, "stands directly in the way of petitioners' contentions . . ." [*U.S. Br.,* 26.] It does not. There the constitutional objection that we make here, perhaps, could have been raised; but, it was conceded away. [337 U.S. at 251-252.] The holding was simply that there was no constitutional right to have any particular rule of evidence made applicable to sentencing procedures. Furthermore, the Court was careful to note that its opinion was "not immune from scrutiny under the due-process clause . . ." [337 U.S. at 252 (fn. 18).]

In its footnote 37, the United States cites a number of cases to the point that the position we take here has been rejected by the courts. No doubt that is true of the majority opinion in *In re Anderson, supra,* 69 Cal. 2d 613, 73 Cal. Rptr. 21, 447 P.2d 117, on the authority of which the case at bar was decided, and in which further review was not sought. But, this Court has never squarely decided the question, and until it does the question will not have been put to rest. Despite California's citation of a number of these cases in its opposition to the petition for certiorari, this Court took the case, evidently to provide the occasion for a definitive decision.[14] [See, *Maxwell v. Bishop, supra,* 398 U.S. at 267 (fn. 4).]

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[14] Indeed, few, if any, of the cited cases can be considered a square decision of the precise question here involved. A good many of them went off on other grounds, as, for example, did *Andres v. United States,* 333 U.S. 740, in which the question of constitutionality was not presented in the petition for certiorari; and was not discussed by the Court.

Many of the cases arose under statutes making the death penalty mandatory, unless there was a recommendation to mercy. [See, *e.g., Petition of Ernst,* 3 Cir., 294 F.2d 556, 561.] A statute like California's is significantly different in its structure and constitutional implications. [See, *Petr. Br.,* 32-33.]

In several of the cases our question was not directly presented, but arose tangentially as a part of the reasoning upon which the single-verdict procedure was being challenged. [See, *e.g., Segura v. Patter-*

2. Non-Capital Sentencing Procedures And Discretionary Sentencing By A Judge Are Not Necessarily Implicated By Petitioner's Contention Of Unconstitutionality, As They Are Classifiably Different From Capital Sentencing.

It is also vigorously argued that the requirement of standards which we invoke, implicates all sentencing procedures, even if it is the judge who sentence. The short answer to this argument is, of course, that if standards are required by the Constitution as a condition upon the sentencing power, it is a condition upon whatever agency of the state is given the power.

In any event, the case of the judge is classifiably different from that of the jury. By reason of his specialized training and experience, it is legislatively reasonable to assume, as the British Royal Commission has said, that he "can be relied on to decide the sentence calmly and without emotion and by reference to general standards and considerations beyond the facts of the individual case and the

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son, 10 Cir., 402 F.2d 249, 252-253; *Maxwell v. Bishop,* 8 Cir., 398 F.2d 138, 148, *vacated on other grounds* 398 U.S. 262.]

There was no unanimity of opinion in the cases upon the reasons for the result reached. In fact, in some of the cited cases no reasons for the result were given. [See, *e.g., McCants v. State,* 282 Ala. 397, 401, 111 So.2d 877, 880-881]; or the reason was, in effect, only reliance on the discussion in *Andres, supra,* 333 U.S. 740, in which the constitutional question was not raised or discussed. [See, *e.g., Florida ex rel. Thomas v. Culver,* 5 Cir., 253 F.2d 507]; or it was that the question was concluded by *People v. Seiterle,* 65 Cal.2d 333, 54 Cal. Rptr. 745, 420 P.2d 217. [See, *United States ex rel. Nelson,* N.D. Cal., 275 F.Supp. 261, 265]. *Seiterle,* in turn, was decided, without other discussion or reasoning, on the authority of two earlier California decisions [*People v. Shipp,* 59 Cal.2d 845, 31 Cal. Rptr. 457, 382 P.2d 577, [*People v. Duncan,* 51 Cal.2d 523, 334 P.2d 858; neither of which decided or was concerned with the absence of standards as a ground of unconstitutionality; and *Giaccio v. Pennsylvania, supra,* 382 U. S. 399, in which the question was not involved.

knowledge of the jury. This argument would apply with special force to cases where the sentence of death is at issue . . ." [*Report*, p. 200.] The judge, it is also legislatively reasonable to suppose, would have a knowledge, not possessed by the ordinary juror, of the law's purposes and objectives in prescribing a given sanction or sanctions for an offense and thus be able to choose the sanction most likely to carry out those purposes or attain those objectives. Surely, he would be in a better position to make the determination than a jury that is not told what those purposes or objectives are or how, as a matter of law, they bear upon the determination of sentence.

In addition, there is the fact, so far as sentencing for non-capital crimes is concerned, of the great difference in the "nature and gravity of the decision rendered by the trier of fact in the penalty trial as contrasted with that of other discretionary sentencing decisions . . ." [*In re Anderson*, 69 Cal. 2d 613, 661-662, 73 Cal. Rptr. 2d 54, 447 P.2d 117, 150, Tobriner, Traynor and Peters, JJ, diss.] The death sentence, once executed, is irrevocable. Lesser sentences, though gave enough in their personal consequences, are remedial or ameliorable in the event of after-discovered error, or accomplishment of their rehabilatory objective. California, under its Indeterminate Sentence Law, has had discretionary non-capital sentencing for many years. Its courts have had no trouble finding adequate standards for exercise of discretion in the law, and differentiating the procedure, on that account, from standardless procedures. [See and *cf.*, *People v. Sidener*, 58 Cal.2d 645, 650-651, 25 Cal. Rptr. 697, 700-701, 375 P.2d 641, 644-645; *In re Lee*, 177 Cal. 690, 692-694, 171 Pac. 958, 959-960; *In re O'Malley*, 101 Cal. App. 2d 80, 83, 224 P.2d 488, 490; *In re Wells*, 35 Cal.2d 889, 892-894, 221 P.2d 947, 949-950; *In re McLain*, 55 Cal.2d 78, 87, 9 Cal. Rptr. 824, 830, 357 P.2d 1080, 1086; *In re Smith*, 33 Cal.2d 797, 803-804, 205 P.2d 662, 667; *In re Larson*, 44 Cal.2d 642, 645, 648, 283 P.2d 1043, 1044, 1046. And see the thorough discussion of this subject by Mr. Justice Tobriner in his dissenting

opinion in *In re Anderson, supra,* 69 Cal.2d at 661-666, 73 Cal. Rptr. at 54-57, 447 P.2d at 150-153.]

3. A Jury's Participation In The Judicial Process, Even As The Surrogate Of The Community, Is Subject To The Limitations Imposed By The Constitution.

First: It is also argued by the United States that the jury, as the surrogate of the community, reflects community attitudes and standards; and that it is important that this community participation in the judicial process be preserved Conditioning the jury's operation by standards fixed by law no more endangers or impairs that participation than limiting their verdicts of guilt to those cases in which the statutorily prescribed elements of the crime are found the evidence beyond reasonable doubt. The jury is not an *ad hoc* legislature, regardless of how important its participation in the adjudicatory process may be.

Further, neither the desirability nor the importance of jury participation negates the insistence of due process of law that there be standards. Even when the attitude of the community is unmistakably expressed by a direct vote of the whole electorate, the result of that action must pass the test of the Constitution. [See, *e.g., Reitman v. Mulkey,* 387 U.S. 369, 370-371, holding unconstitutional an initiative measure overwhelmingly adopted in California, which had the effect and purpose of encouraging and involving the State in racial discrimination; *Lucas v. Forty-Fourth General Assembly,* 377 U.S. 713, 715-718, 736-737, holding unconstitutional a legislative apportionment adopted in Colorado by vote of the people.]

Second: The matter of sentencing, it is argued, may safely be left to the "common sense" of the jury. It is no disparagement of the jury system to point out that a jury's common sense is free to operate only within the limits fixed by the Constitution. Not even the United States, we suspect, would argue in favor of the validity of a statute that left to the common sense of the jury, without any

objective definition or standards, the question whether the killing of a human being was murder, punishable by death, or manslaughter punishable by a term of imprisonment. The jury, no matter how common sensible it may be, cannot be permitted to legislate for the occasion only. There is no difference in principle simply because it is sentencing, rather than a finding of guilt, that is involved. [*Petr. Br.*, 23-29.]

CONCLUSION

Complying with Rule 40(h), we have specified "with particularity the relief" to which we believe the petitioner is entitled. [*Petr. Br.*, 35.] No challenge to that specification or the reasoning by which it was derived [*Petr. Br.*, 34] has been offered by California. If, as we submit is so, California's capital-sentencing procedure offends against the Due Process Clause, there is, seemingly, no issue as to the relief the petitioner ought to have.

Respectfully submitted,

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No. 203

Petition for rehearing
(not printed)
(filed May 20, 1971)